

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

E. & J. GALLO WINERY, a California corporation,) CV F 05-0101 AWI LJO
Plaintiff,) ORDER ON PLAINTIFF'S EX
v.) PARTE APPLICATION FOR
ANDINA LICORES S.A., a corporation) CONTINUANCE, DENYING
organized under the laws of Ecuador,) OR STRIKING DEFENDANTS
Defendant) CROSS-MOTION AND
) STRIKING PORTION OF
) DEFENDANT'S REPLY BRIEF
) Document # 128-1

In this action for declaratory relief, abuse of process, unfair competition, and breach of contract, plaintiff E. & J. Gallo Winery (“Plaintiff”) has made an *ex parte* application to: (1) continue the hearing on Plaintiff’s motion for summary judgement; (2) strike the cross-motion for summary judgment by defendant Andina Licores S.A. (Defendant) or, in the alternative, grant an extension of time for reply to Defendant’s opposition; and (3) to strike a portion of Defendant’s reply brief to Defendants motion to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, where it is alleged Defendant raised new issues not raised in its motion to dismiss; or, in the alternative, to permit Plaintiff to sur-reply.

On March 29, 2006, the court issued an order moving the date of the pretrial conference to July 20, 2006, and the trial date to August 15, 2006. The same order also took the parties' briefings on Plaintiff's motion for summary judgment under submission as of April 3, 2006. Plaintiff has acknowledged that the court's order taking the matter under

1 submission and moving the pretrial conference and trial dates addresses Plaintiff's concern
2 regarding the date of the hearing on the motion for summary judgment and renders Plaintiff's
3 *ex parte* application to move the hearing date moot.

4 The court next considers Plaintiff's *ex parte* application to strike Defendant's cross-
5 motion for summary judgment or in the alternative, to be granted an extension of time to file
6 a responsive pleading. The court has reviewed Defendant document titled "[Defendant's]
7 OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES REGARDING
8 [Plaintiff's] MOTION FOR SUMMARY JUDGMENT, SUMMARY ADJUDICATION,
9 PRELIMINARY INJUNCTION; NOTICE OF MOTION AND CROSS-MOTION FOR
10 SUMMARY JUDGMENT AND SUMMARY ADJUDICATION OF AFFIRMATIVE
11 DEFENSE" (hereinafter "Defendant's Opposition"). After reviewing Defendant's
12 Opposition, the court does not agree with Plaintiff that the pleading actually constitutes a
13 cross-motion for summary judgment, regardless of what the title says. The court finds
14 Defendant's Opposition is simply an opposition to Plaintiff's motion for summary judgment
15 and will construe Defendant's Opposition as such.

16 Having made that finding, however, the court also finds Defendant's Opposition is
17 written in a way that conveys some ambiguity as to exactly what Defendant intends to
18 accomplish as a result of the pleading. The parties are cautioned to keep in mind precisely
19 what issues are before this court and what issues are before the Ecuadorian court. The only
20 issues before this court are the issues raised by Plaintiff's complaint and by Defendant's
21 defenses to the allegations in that complaint. Thus, the Ecuadorian Decree 1038-A, which
22 Defendant discusses at some length and in many different contexts, is relevant in this case
23 only as to two issues: (1) does Decree 1038-A modify or otherwise inform the legal standard
24 this court will employ to determine whether Plaintiff is entitled to summary judgment in its
25 claims; and (2) does Decree 1038-A modify or otherwise inform the legal standard this court
26 will employ in determining the validity of any affirmative defense Defendant may assert? In

1 other words, this court will consider the impact of Decree 1038-A only insofar as it may
2 inform or modify the legal analysis in this case in this court.

3 Whether Decree 1038-A may or may not modify or inform the legal analysis the
4 Ecuadorian court applies to the issues before it in the Ecuadorian action is of no concern to
5 this court. The court has previously discussed the non-identity of the action instituted in
6 Ecuador by Defendant and the Action instituted in this country by Plaintiff. The parties are
7 referred to the court's memorandum opinion and order filed June 27, 2005, Document # 62,
8 where the court discussed the separate nature of the actions and the lack of preclusive effect
9 that one court's determination might have on the other. The court points out that to date
10 neither party has presented a compelling argument that either this court or the Ecuadorian
11 court is under an obligation to harmonize its determinations with those of the other court.
12 Thus, the court recognizes the possibility, in the abstract, that Plaintiff in this case may
13 receive a favorable judgment on its allegation of breach of contract, for example; only to find
14 its judgment unenforceable in Ecuador where Defendant has secured a favorable judgment on
15 its allegation of breach of contract, which may well be unenforceable in this country

16 The court will deny Plaintiff's *ex parte* application to strike Defendant's alleged
17 "cross-motion" for summary judgment. The court will, however, disregard any argument
18 appearing in Defendants pleading that the court finds irrelevant to the issues directly before
19 the court in this case. Plaintiff will be granted ten (10) days from the date of service of this
20 order to file and serve a response to Defendants Opposition.

21 Plaintiff has also made an *ex parte* application to strike portions of Defendant's reply
22 brief in support of its motion to dismiss Plaintiff's complaint pursuant to FRCP 12(c) because
23 Defendant's reply set forth two entirely new arguments that had not been raised in its initial
24 opposition. The court has examined the portion of Defendant's reply brief to which Plaintiff
25 refers. The argument Defendant presents in this section appears to be a generalized statement
26 on the limitations of declaratory relief where the parties' relationship to each other has

1 ceased, except for the determination of claims for damages for past wrongs, and there are no
2 rights that remain to be allocated pertaining to any future relationship. The objected-to
3 portion of Defendants reply also appears to set forth an argument against the use of
4 declaratory relief as a means of establishing res judicata over issues being litigated in another
5 case. It is also possible that the objected-to portion may be extraneous material meant as
6 additional background to their argument on the defense of litigation privilege.

7 The problem the court faces is that it is not confined to the cases cited by the parties
8 in making its determination as to what scope of declaratory relief, if any, it may grant with
9 respect to Plaintiff's motion for summary judgment. Thus, the court could strike Defendants
10 arguments as requested, but independently cite one or more cases used by Defendant to
11 determine the lawful extent of declaratory relief, particularly as such relief may relate to the
12 case in progress in Ecuador. In other words, even if the court strikes the objected-to
13 argument, the court could find itself citing cases from the stricken portion of Defendant's
14 reply to make determination concerning the appropriateness of declaratory relief. The court
15 finds the surest way to avoid prejudice to either party is to deny Plaintiff's motion to strike
16 without prejudice and allow Plaintiff to file a sur-reply.

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18 Therefore, in consideration of the foregoing discussion, it is hereby ORDERED that:
19 1. Plaintiff's *ex parte* application for rescheduling of hearing on motions to dismiss and
20 for summary judgment is DENIED as moot.
21 2. Plaintiff's *ex parte* application to strike those portions of Defendant's Opposition that
22 may be construed as a cross-motion for summary judgment is DENIED. Plaintiff may
23 file and serve a reply brief in support of its motion for summary judgment on or
24 before 4:00 p.m. on Tuesday, April 18, 2006.
25 3. Plaintiff's *ex parte* application to strike a portion of Defendant's reply brief in support
26 of its motion to dismiss is DENIED without prejudice. Plaintiff may file and serve a

1 sur-reply brief on or before 4:00 p.m. on Tuesday, April 18, 2006.
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3 IT IS SO ORDERED.
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5 **Dated: April 7, 2006**
6 h2ehf

7 /s/ Anthony W. Ishii
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